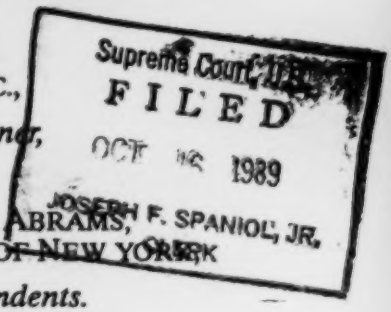
(6)

No. 89-204

IN THE

Supreme Court of the United States

October Term, 1989



E. R. SQUIBB & SONS, INC.,
Petitioner,
-against-
MINDY HYMOWITZ and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Respondents.

E. R. SQUIBB & SONS, INC.,
Petitioner,
-against-
ELIZABETH TIGUE, et al.,
Respondents.

E. R. SQUIBB & SONS, INC.,
Petitioner,
-against-
JANE DOLAN and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Respondents.

REPLY BRIEF OF PETITIONER

ALLEN F. MAULSBY
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, N.Y. 10019

BARRY M. EPSTEIN
MARC S. KLEIN
SILLS CUMMIS ZUCKERMAN RADIN
TISCHMAN EPSTEIN & GROSS
450 Park Avenue
New York, N.Y. 10022

DAVID A. BARRETT
Counsel of Record
DUKER & BARRETT
90 Broad Street
New York, N.Y. 10004
(212) 809-7700

ROBERT L. DICKSON
DAVID J. FLEMING
DICKSON, CARLSON & CAMPILLO
150 Broadway, Suite 1600
New York, N.Y. 10038

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CONSTITUTIONAL AND STATUTORY PROVISIONS

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INTRODUCTION

The significance of the constitutional questions presented by this appeal is apparent from the briefs in opposition. Respondents recognize that non-identification and non-exculpation liability raise difficult issues that have sharply divided the lower courts. Indeed, the very language used and concerns expressed by the court below about the rule it adopted (*see* pp. 3-4 below) demonstrate the need for this Court to establish constitutional parameters to circumscribe the states' development of their common law in this area.[1]

The briefs in opposition also appear to concede a number of matters of particular significance to that constitutional inquiry.

First, respondents concede that due process requires a plaintiff in a civil action for money damages to prove the elements of his or her cause of action by a preponderance of the evidence. *See* Squibb's Petition for Certiorari ("Squibb Pet.") at 15-17; Brief in Opposition for Respondent Jane Dolan ("Dolan Br.") at 15-16; Tigue Brief in Opposition in Nos. 89-168 and 89-204 ("Tigue Br.") at 2, 13.

Second, respondents do not dispute Squibb's showing (Pet. at 13-14) that the identification of a defendant as responsible for causing a plaintiff's injuries is a fundamental element of a civil tort action. Rather, they argue that "collective liability" (Tigue Br. at 8) may be imposed upon any one of hundreds of potential defendants because each of them allegedly created a "risk to the public at large". That argument, however, ignores the holding below—and the numerous decisions elsewhere—that have expressly rejected all recognized theories of joint liability in DES suits. *See* p. 6 below. Because the identification requirement performs a unique function in constitutional terms, its abrogation—particularly

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1 *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (establishing minimum constitutional standard for libel suits brought by private individuals: "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability").

when combined with the elimination of any opportunity for exculpation—raises serious constitutional questions.

Third, respondents essentially admit that defendants in these cases comprise less than 50% of the "national market" for DES. *See* Tigue Br. at 5, 10 n.8.[2] Thus, it is impossible as a matter of law for respondents to prove by a preponderance of the evidence that Squibb produced the DES that allegedly injured them. Yet the decision below would hold Squibb liable for its purported "market share" of whatever sums every New York plaintiff could convince each jury to award.

Fourth, respondents do not dispute that all of the conditions allegedly caused by DES can in fact occur in women who were never exposed to the drug. By contrast, when this Court upheld a retroactive compensation system enacted by Congress after extensive investigation, the condition involved, black lung disease, was "a distinct clinical entity" "caused by long-term inhalation of coal dust." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 6-7 & n.2 (1976). No such certain connection between DES exposure and plaintiffs' alleged conditions is possible here.

Finally, respondents make much of "social policy" arguments, which they say favor compensating plaintiffs who "through no fault of their own" cannot identify the proper DES manufacturer to sue. *See* Dolan Br. at 13-15. What respondents ignore, however, is that the passage of time has made identification equally difficult for defendants. With the evidence in equipoise at best, due process does not permit a court to take a defendant's property and award it to a plaintiff. Concepts like risk-spreading and cost-avoidance (*see* Dolan Br. at 14-15) may make sense when they are applied in a generally prospective manner. Here, however, the decision

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2 Even under the leading California cases adopting market share liability (and assuming its constitutionality), it would be an "injustice" to award damages when defendants represent only a minority of the DES market. *See Brown v. Superior Court*, 44 Cal.3d 1049, 1073, 245 Cal. Rptr. 412, 427, 751 P.2d 470, 485 (1988) ("to diminish the injustice" of non-identification liability, manufacturers of a "substantial share" of DES must be named as defendants).

below attempts to apply them retroactively to punish a narrow class of defendants arbitrarily.

I. Review at This Time Will Promote Federal Interests and Enhance Judicial Economy.

Respondents urge denial of the writ because the judgments below remanded these cases for further proceedings. Tigue Br. at 6. Beyond the conclusory claim that only after trial "would an adequate factual record exist" (*id.*), respondents have failed to identify any factual questions that would, after remand, further illuminate the federal questions raised here. On the other hand, if New York's DES liability scheme is unconstitutional, Squibb should not be forced to defend itself in the hundreds of pending New York cases where plaintiffs concededly cannot prove that Squibb caused their injuries. Nor should the lower courts be burdened with hearing cases that ultimately will be reversed on appeal. Accordingly, this Court has jurisdiction to hear this appeal and to resolve the substantial constitutional questions that it presents. *See* Squibb Pet. at 11-12 n.13.

II. New York's Version of Non-Identification "Collective Liability" Is Fundamentally Flawed and Constitutionally Defective.

The briefs in opposition strive mightly to explain away the fundamental irrationality of the decision below, but ultimately they fail to do so. Respondents criticize Squibb for characterizing the decision as "unprecedented" and "radical". *See* Tigue Br. at 8. Yet the dissent below used those very words to describe the decision. *See* Squibb's Appendix to Petition for Certiorari ("App.") at 28a. As demonstrated in Squibb's petition and the cross-petition of Eli Lilly & Co. (No. 89-397), the decision is just that.

Similarly, respondents attack Squibb's arguments that New York's DES rule is unconstitutional because it does not "provide a reasonable link between liability and the risk created by a defendant to a particular plaintiff" (App. 17a); because non-identification "liability will [not] approximate causation" (App. 16a-17a); and because "the chance that a

particular producer caused the injury is often very remote" (App. 9a). *See* Tigue Br. at 1-2, 7; Dolan Br. at 13. Yet the court of appeals itself acknowledged the accuracy of every one of these defects in its rule.[3]

There can be no doubt that a theory of liability that fails to "provide a reasonable link between liability and . . . risk" is unconstitutional. Without a "reasonable link", it is irrational for a court to compel transfer of the defendant's property to the plaintiff. Implicitly acknowledging this point, respondents are left with the unsupportable proposition that the New York rule is constitutional because, by allegedly creating "a risk to the public at large", all DES producers subjected themselves to liability to every member of the public who took the drug.

That argument raises substantial constitutional questions. It amounts to permitting a private plaintiff to use the judicial process to take a defendant's property upon a showing that the plaintiff suffered the same type of injury allegedly caused by defendant's activity—but without showing any further connection between the plaintiff and the defendant's actions. "Risk to the public at large" simply does not establish a sufficient nexus between a private plaintiff and a private

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3 Respondent Tigue's claim that Squibb's reliance on these statements is misplaced (Tigue Br. at 1-2), simply misreads the decision below. In context, all of the statements can reasonably be applied to describe the court's market-share theory.

Respondent Tigue also misrepresents several cases in attempting to argue that other courts have imposed non-exculpation liability (Tigue Br. 9-10). In fact, the cited cases expressly and uniformly permit exculpation. *See Brown*, 44 Cal.3d at 1074, 245 Cal. Rptr. at 427, 751 P.2d at 486 (defendant may "show that another producer made the DES that caused the injury"); *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164, 174, *cert. denied*, 469 U.S. 833 (1984) (liability imposed "if the defendants are unable to exonerate themselves"); *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521, 1527 (D. Mass. 1985) ("opportunity to present exculpatory evidence"). The general language that respondent quotes is simply acknowledging—as Squibb argues here—that market share liability will inevitably, as a matter of mathematical probability, result in damage awards against defendants that did not in fact supply DES to plaintiff's mother, but that are also unable to exculpate themselves.

defendant to justify a transfer of wealth between them on a retroactive basis.

This due process objection is not met by respondents' claim that "[t]here is no . . . unfair shifting of burden of proof requirements" because a plaintiff still must prove all elements of her cause of action other than the defendant's identity by a preponderance of the evidence. Dolan Br. at 15-16; *see* Tigue Br. at 2, 13. The other elements are simply irrelevant to the due process issues here. That they must be proven shows only that New York maintains a fault system for tort liability. A defendant should not suffer the expense and risk of defense as to any elements of a tort if the plaintiff cannot identify that defendant as the alleged wrongdoer.

In any event, respondents' argument proves too much. Taken to its logical conclusion, it suggests that a state court could eliminate any elements of a common law tort that became too difficult for a class of plaintiffs to prove. If proof of damages were particularly troublesome, a million dollars might be presumed. *Cf. Gertz*, 418 U.S. at 349-50 (presumed and punitive damages in non-actual malice libel cases violate the First Amendment). If proof of defendants' fault (whether under traditional rules or strict liability) were problematic, then any manufacturer of a product might be presumed liable. Although due process obviously does not freeze the "common law . . . in the Plantagenet period" (*see* Dolan Br. at 18), these examples, together with the hit-and-run accident hypothetical posited in Squibb's petition (at 17), suggest that a change in a common-law rule is not "rational" under the Due Process Clause merely because a class of plaintiffs could not prevail without it. The real issue is whether the resulting legal rule brings about an arbitrary seizure of property.

By eliminating the identification requirement and precluding exculpation, New York's DES liability rule has just such an impact. The identification requirement (which logically must incorporate a defendant's right to present exculpatory evidence) affords the defendant direct protection against arbitrary confiscation of its property. It alone ensures that property taken in a judicial proceeding belongs not to a

stranger to the transaction at issue, but to the person responsible for plaintiff's injuries. To abolish the identification requirement, therefore, is to turn courts into "roving commissions", *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973), that may fasten liability on any defendant that happens to have acted in a way not inconsistent with the type of harm that plaintiff suffered. It punishes "negligence in the air". *See* Squibb Pet. at 13. To avoid that unacceptable result, courts have repeatedly recognized the fundamental nature of the identification requirement (*id.*)—a point not disputed by respondents. A substantial question is therefore raised by whether the identification element of a tort claim stands on a different constitutional footing from other elements such as privity or standard of care.

Respondents also seek to justify imposition of liability by arguing that "each plaintiff has been wronged by the entire DES industry, and not just by the manufacturer of the pill taken by her mother". Dolan Br. at 14. That argument, however, is flatly inconsistent with the many decisions (including the holding below) that have repeatedly rejected "extant common law doctrines" (App. 10a)—including alternative liability, concerted action and enterprise liability—as a basis for recovery in DES cases. Each of those doctrines contains important substantive protections to preclude "collective liability" (Tigue Br. at 8). It is precisely because DES manufacturers did not act in a "collective" manner that the courts have consistently refused to apply those doctrines. *See, e.g.*, App. 7a-10a; *Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 163 Cal. Rptr. 132, 607 P.2d 924, 928-35, *cert. denied*, 449 U.S. 912 (1980). The decision below failed, however, to recognize that the substantive limitations that make recovery unavailable under traditional joint liability doctrines perform the crucial constitutional function of limiting liability only to those defendants that are proven, by a preponderance of the evidence, actually to have injured the plaintiff. *See* Squibb Pet. at 17-18 n.16.

Nor are the constitutional questions answered by limiting a defendant's liability to its "market share". Forcing a defen-

dant to pay even its "market share" raises serious constitutional questions when that defendant should not be liable at all. As noted in Squibb's petition (at 19-20), even Congressional enactments that retroactively "'impose a new duty or liability based on past acts'", *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986), quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976), "may be arbitrary and irrational in the absence of any connection between the [defendant's] conduct and some detriment to the [plaintiff]". *See Connolly*, 475 U.S. at 229 (O'Connor, J., concurring).

This case raises precisely the concerns that troubled Justice O'Connor in *Connolly*: The only "connection" between plaintiff and defendant is that plaintiff was a member of the public and defendant allegedly "created a risk to the public at large". Unlike the Congressionally sanctioned adjustments of "the benefits and burdens of economic life to promote the common good," *Connolly*, 475 U.S. at 225, that this Court has upheld, albeit only after careful scrutiny, in cases such as *Connolly* and *Turner*, New York's DES compensation scheme does not contain "a significant number of provisions . . . that moderate and mitigate the economic impact of . . . individual . . . liability." *Id.* at 225-26. *Cf. Turner* at 9 n.8, 26 n.24 (employer's retroactive liability under Black Lung Benefits Act capped at $37,800 per miner). On the contrary, juries remain free to make virtually unfettered damage awards.

III. New York's "Revival" Statute Is Irrational.

In arguing to support the constitutionality of the 1986 New York statute reviving otherwise time-barred claims based on exposure to DES and four other substances (*see* Squibb Pet. at 2, 7), respondents are forced to take positions inconsistent with their arguments on the merits. Their need to do so underlines the significance of the constitutional questions raised by the statute.

For example, when arguing the merits, respondents state that in denying defendants' summary judgment motions, the courts below engaged in "the temporary assumption . . . that

the defendants were liable under New York's product [liability] laws. There have been no findings of liability yet." Tigue Br. at 2. In arguing that singling out DES claims for revival was not arbitrary, however, respondents claim that "a causal relationship had been demonstrated between . . . exposure and injury." Dolan Br. at 23; *see also* Brief of Respondent Robert Abrams, Attorney General ("Abrams Br.") at 5. In fact, plaintiffs' speculative causation claims generally have been rejected by juries. *See* Squibb Pet. at 7.

Similarly, respondents argue on the merits that special liability rules are justified for DES because of the long latency period between exposure and alleged manifestation of injury. (*See* Tigue Br. at 4; Dolan Br. at 7, 12). Respondents seek to justify the revival statute on this basis as well (*see, e.g.*, Abrams Br. at 14), but are then faced with the obvious irrationality of reviving claims that were known during the limitations period,[4] and thereby do not fit within the stated purpose of the statute. Respondents are left arguing, with no persuasive explanation, that excluding such claims from revival would be "arbitrary" (Abrams Br. at 15), when it is in fact their inclusion that is inexplicable.

Respondents also rely on the "authoritative legislative history" (Abrams Br. at 5) to justify revival, yet they ignore the most pertinent legislative pronouncement on the merits: "We are not changing substantive right[s], certainly not retrospectively." *See* Squibb Br. at 20 & n.17. Nor do respondents address the fact that the "authoritative legislative history" indicates a total failure to investigate crucial scientific issues of causation. Rather, the legislative history reveals that the substances covered by the revival statute were picked after one-sided "consultations with the victims groups throughout the State." Abrams Br. at 5. Absent an objective inquiry, singling out DES claims for revival is patently arbitrary.

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4 This could occur with some frequency because under New York law, all statutes of limitation are tolled while the plaintiff is an infant. N.Y. Civ. Prac. L. & R. § 208 (McKinney Supp. 1989).

Even Attorney General Abrams admitted at that time that "[i]deally the revival would have applied to all victims regardless of the . . . chemical to which they were exposed." Abrams Br. at 6. Although imperfect legislative classifications do not necessarily violate equal protection or due process guarantees, the foregoing inconsistencies demonstrate that the legislature's supposed "effort to contain costs" (*id.* at 14) in reality masks a constitutionally impermissible political expediency that led to irrationally singling out DES in the revival statute.

CONCLUSION

For the foregoing reasons, and those discussed in the petitions of Squibb and of Rexall Drug Company in No. 89-168, and in the cross-petition of Eli Lilly & Co. in No. 89-397, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

ALLEN F. MAULSBY
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, N.Y. 10019
(212) 474-1000

DAVID A. BARRETT
Counsel of Record
DUKER & BARRETT
90 Broad Street
New York, N.Y. 10004
(212) 809-7700

BARRY M. EPSTEIN
MARC S. KLEIN
SILLS CUMMIS ZUCKERMAN
RADIN TISCHMAN
EPSTEIN & GROSS
450 Park Avenue
New York, N.Y. 10022
(212) 349-7600

ROBERT L. DICKSON
DAVID J. FLEMING
DICKSON, CARLSON & CAMPILLO
150 Broadway, Suite 1600
New York, N.Y. 10038
(212) 791-9640

Attorneys for Petitioner
E. R. Squibb & Sons, Inc.